IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 514

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

Statement

The issue in this case is whether the City of New York can levy a tax upon gross receipts derived by respondent from loading and unloading, at piers located within the City of New York, vessels engaged exclusively in interstate and foreign commerce.

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), this Court held that the State of Washington could not levy such a tax.

Respondent is a New York corporation engaged in the general stevedoring business (R. 27-28). During the years

1938-1941, inclusive, it loaded and unloaded steamships at piers located within the City of New York* (R. 30).

All of the ships were engaged in interstate or foreign commerce (R. 63; 66; 68-69).

Petitioners levied a tax upon this business measured by respondent's gross receipts and respondent, paying the tax under protest, brought this proceeding for refund.

Opinions Below

On the authority of *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), the New York Supreme Court, Appellate Division, First Department, unanimously annulled the determination of the Comptroller of the City of New York, denying respondent's application for refund, and directed that the refund be made (269 App. Div. 685 (1945)) (R. 181).

The order of the Appellate Division was unanimously affirmed by the New York Court of Appeals without opinion (294 N. Y. 908 (1945)).

Jurisdiction

Respondent concedes the jurisdiction invoked by the petitioners.

Question Presented by the Petitioners

Since the facts in this case, in so far as they relate to the taxation of gross receipts from loading and unloading ships in interstate commerce, are identical with the facts

* Respondent also carried on stevedoring operations outside of the City of New York, in Hoboken, New Jersey, and elsewhere, which petitioners also taxed, but petitioners apparently now concede that this tax was improper (Petition, par. 8, p. 5), and so we will treat the case as if respondent's activities took place within the City of New York and as if the only tax in question was the tax measured by the gross receipts from the New York activities.

in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), the sole question presented by petitioners is whether the *Puget Sound* case is still good law.

What petitioners seek, in effect, is a reargument of the *Puget Sound* case. We respectfully submit that there is no occasion for it.

POINT I

This Court has never receded from its holding in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), that gross receipts from transportation in interstate commerce may not be subjected to local taxation.

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), this Court held, without a dissent, that "a tax laid upon the business of a stevedoring company, the amount to be measured by a percentage of the gross receipts" was invalid under the Commerce Clause in so far as the receipts were derived from loading and unloading ships in interstate commerce. Mr. Justice CARDOZO, writing for the unanimous Court, said at page 94:

> "The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."

In the *Puget Sound* case itself and in subsequent decisions commencing with *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), this Court sustained taxes on gross receipts from local activities, which, though related to interstate commerce, were separate and distinct therefrom, but it has never sustained such a tax where the local activities consisted entirely of the transportation and movement of goods in interstate commerce.

In the *Western Live Stock* case, *supra*, where this Court

sustained a tax imposed by the State of New Mexico on gross receipts derived from the sale of advertising space in a magazine which had an interstate circulation, Mr. Justice STONE, writing for the majority, pointed out that, although "taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce" is valid (p. 253), "local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional" (p. 255).

In *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604 (1938), where this Court sustained a tax imposed by the State of Louisiana based on the horsepower of engines used to propel natural gas through interstate pipe lines, Mr. Justice REED, writing for the majority, clearly differentiated between a tax levied on articles "withdrawn from the transportation movement" and a tax levied on transportation itself (p. 610), and cited the *Puget Sound* case in a footnote to illustrate the type of tax which "has frequently met the condemnation of this Court as a regulation of commerce" (p. 609).

In *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), where this Court invalidated an Indiana gross income tax as applied to interstate sales, Mr. Justice ROBERTS, writing for the majority, also cited the *Puget Sound* case in a footnote to illustrate the type of tax which this Court has repeatedly held to be a "regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8, of the Constitution" (p. 311).

In *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939), where this Court, for at least the third time, struck down the State of Washington gross receipts tax as applied to receipts from interstate commerce, Mr. Justice STONE, writing for the majority, said:

> "We need not stop to consider which, if any, of appellant's activities in carrying on its business are

> in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, * * *" (p. 437).

In a separate, concurring opinion, Justice BUTLER and McREYNOLDS cited the *Puget Sound* case (p. 442).

In *Southern Pacific R. R. Co.* v. *Gallagher*, 306 U. S. 167 (1939), where this Court sustained a use and storage tax levied by the State of California, Mr. Justice REED, writing for the majority, said:

> "Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid. States cannot tax interstate telegraph messages, or freight shipments. * * * A tax act as applied to the business of interstate communication is unconstitutional. * * * This rule is applicable to a tax on gross receipts from interstate transportation; * * *" (pp. 174-175).

Referring to the *Puget Sound* case, Justice REED said:

> "* * * the distinction in the opinion between stevedoring in loading and unloading interstate cargoes, held nontaxable as a burden upon commerce, and the business of supplying longshoremen for others to load and unload, held taxable as a local business, is applicable here. The invalid tax in the Puget Sound Stevedoring Co. case was on the business of stevedoring, measured by a percentage of gross receipts from interstate activity. The valid tax was a similar percentage on the local activity as an employment agency" (pp. 178-179).

In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), where this Court sustained a sales tax levied by the City of New York on the sale in New York

City of coal mined in Pennsylvania, Mr. Justice STONE, writing for the majority, said:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey * * *" (p. 48).

Petitioners also cite *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941); *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252 (1941); *Allied Mills, Inc.* v. *Department of Treasury*, 318 U. S. 740 (1943) and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944). All of these cases deal with the Indiana gross receipts tax and none of them bears upon the constitutionality of a tax upon transportation itself.

We submit that this Court has never questioned its holding in the *Puget Sound* case. On the contrary, it has repeatedly recognized in its later decisions that a state or local tax on gross receipts derived from the transportation and movement of goods in interstate commerce is invalid under the Commerce Clause.

POINT II

The Commerce Clause was intended to protect interstate commerce from the cumulative burden of local taxes.

Petitioners state in their brief (p. 18), "In the case at bar there is no possibility of a burden of cumulative

multiple taxation". Their argument is that because respondent's business activities are confined to the City of New York they are beyond the reach of the taxing authorities of any other State or municipality and hence there is no possibility of this particular respondent being subjected to any additional tax burden.

But the test is not whether the taxpayer is subjected to the risk of multiple taxation but whether interstate commerce is, or can be, subjected to the burden of cumulative multiple taxes regardless of the number of persons on whom the taxes are imposed. The rule against multiple taxation is for the protection of the interstate commerce, not the individual taxpayer.

In *Western Live Stock* v. *Bureau of Revenue, supra,* Mr. Justice STONE said:

> "The vice characteristic of those (taxes) which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

In *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* Mr. Justice STONE, referring to taxes on interstate transportation or communication, said:

> "Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce" (p. 48).

It was to prevent just such an accumulation of tax burdens upon interstate commerce that the Commerce

Clause was inserted in the Constitution. As Mr. Justice BLACK pointed out in his dissenting opinion in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 452:

> "The 'disastrous experiences under the Confederation when the states vied in discriminatory measures against each other' united the Constitutional Convention in the conviction that some branch of the Federal Government should have exclusive power to regulate commerce among the States and with foreign nations."

Petitioners miss the point entirely when they assert that there is no possibility of cumulative multiple taxation forbidden by the Commerce Clause merely because this respondent's local business activities cannot be taxed by any other taxing authority.

Conclusion

The doctrine of the *Puget Sound* case remains unimpaired by the subsequent decisions of this Court on which the petitioners rely. The *Puget Sound* case is decisive of the present case and no sound reason exists for a review of the present case by this Court. The petition for certiorari should be denied.

November 8, 1945.

Respectfully submitted,

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